87-1114

No. 87-

In the

Supreme Court of the United States

OCTOBER TERM, 1987

C. PETER WHITMER,
Petitioner,

v.

THE STATE BAR OF ARIZONA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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JANUARY 2, 1988

QUESTIONS PRESENTED FOR REVIEW

1. Whether the existence of an attorney-client relationship between the prosecuting attorneys and the hearing judges in an attorney disciplinary proceeding, with the prosecutors as attorneys and the hearing judges as clients, is a *per se* violation of the Due Process Clause either because the relationship makes it impossible for the hearing judges to be neutral and detached or because it impermissibly merges the prosecutorial and adjudicatory functions.

2. Whether the Due Process Clause tolerates an attorney disciplinary proceeding in which the hearing judges sign the complaint, appoint the prosecutors, confer with them after the initial charges are filed on an *ex parte* basis about adding, dropping and amending charges, about further investigations and about the evidence likely to be produced by both sides and then refuse to disclose what was discussed at the *ex parte* meetings by claiming that they are protected by the attorney-client privilege.

3. Whether a *de novo* review by a state supreme court, based solely upon a transcript of the evidence given before hearing judges, can cure a Due Process infirmity resulting from an impermissible bias by the hearing judges towards the prosecution, or whether the Due Process Clause requires that in every case the person before whom the evidence is given be neutral and detached.

Stephen M. Zang, who was petitioner's law partner throughout the proceedings below, was a co-respondent with petitioner in the disciplinary proceedings at issue here. He is not, however, a party to this petition.

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C. Peter Whitmer respectfully petitions the Court to issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Arizona, issued on July 8, 1987.

OPINIONS BELOW

The opinion of the Supreme Court of Arizona is reported at 741 P.2d 267 and is set out in Appendix A at pages 1-40. The court's order denying rehearing and its mandate of the same date appear in Appendices D and E, at pages 131 and 133, respectively.

The opinion of the Disciplinary Commission of the Arizona Supreme Court is unreported. It was entered on February 4, 1986, and appears in Appendix B at pages 41-90.

The opinion of Special Local Administrative Committee S-25, before which the evidence in this case was taken, is likewise unreported. It was issued on October 24, 1984, and is set out in Appendix C at pages 91-130.

JURISDICTION

The judgment and opinion of the Supreme Court of Arizona were issued on July 8, 1987. On September 16, 1987, that Court denied a timely petition for rehearing and issued its mandate.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1247(3). This petition is timely filed pursuant to an order of Justice Sandra Day O'Conner, granting an enlargement of time under Supreme Court Rule 29.2, up to and including January 2, 1988.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> . . . Nor shall any State deprive any person of life, liberty or property, without due process of law. . . .

The applicable rules of the Supreme Court of Arizona are set out in Appendix F, at the back of this petition.

STATEMENT OF THE CASE

In early 1982, the Arizona Supreme Court's Disciplinary Commission appointed Special Administrative Committee S-25, whose sole function was to investigate allegations of unethical conduct against the petitioner and his law partner.

The special committee was created after—and presumably in response to—the regular administrative committee's failure to file charges after investigating petitioner's advertising practices.

Under the rules then in effect, the special committee was responsible for investigating the charges, determining whether there was probable cause to file a formal complaint, preparing the complaint, appointing the prosecutors and then sitting as the triers of fact. *See,* Former Rules of the Arizona Supreme Court, Appendix F.[1]

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[1]Although these rules were repealed in 1984, they governed all proceedings in the case at bar. 741 P.2d 268, n.1; Appendix A, n.1, page 37.

Custom and practice within the State Bar required an administrative committee to notify the attorney being investigated and allow him to present evidence of his innocence. This was to be done *before* the Committee made a probable cause determination. The Special Committee in the case at bar ignored this requirement. It filed and thrice amended the initial complaint without ever asking petitioner for his view of the contemplated charges.

The Committee was also empowered to investigate on its own; i.e., to look for unethical conduct even in the absence of a complaint from someone. As set forth below, this power was used on several occasions.

To assist them with "the investigation and presentation of evidence," the Committee appointed three Phoenix attorneys to act as Bar Counsel. See Rule 33(b)(2), Appendix F. This rule states that "the general function of bar counsel . . . shall be to present all the material facts to the appropriate committee. . . . Their function is not that of a prosecutor."

Bar counsel were, however, prosecutors in fact if not in name. They took contested depositions, issued subpoenas, made discovery demands, resisted discovery and other requests made by the petitioner, opposed motions to dismiss, moved to amend the complaint, opposed petitioner at motions hearings, presented evidence of the charges at trial, and prepared briefs opposing the petitioner's position before the Committee, the Disciplinary Commission, and the Arizona Supreme Court.

The Committee met on an informal *ex parte* basis with bar counsel to consider the charges and the evidence to support them and to determine whether probable cause existed to file charges. *See*, Former Rule 33(b)(2). On December 15, 1982, the Committee filed a ten count complaint. Because the Committee's probable cause discussions with bar counsel were oral and unreported, the record contains no indication of the basis upon which probable cause was found.

Petitioner retained counsel and promptly moved to dismiss for lack of probable cause and because the complaint failed to provide adequate notice of the charges. This motion was denied.

Bar counsel and the Committee used their subpoena power

to continue their investigations long after the original complaint was filed. These investigations resulted in a First Amended Complaint being filed on July 5, 1983. One Count was added, two were dropped, and material changes were made in all but one of the remaining eight.

The Due Process issues raised in this Petition surfaced a few days after the First Amended Complaint was filed. Petitioner learned informally that bar counsel had had several *ex parte* meetings with the Committee. When petitioner asked bar counsel to explain, bar counsel demurred, saying that the conversations were protected from disclosure by both the attorney-client and the attorney work-product privilege.

On July 8th, petitioner moved to disqualify the Committee on the ground that these conversations, among other things, were evidence of an unconstitutional merger of the prosecutorial and adjudicative functions.

Petitioner argued that this merger—and in particular the attorney-client relationship between the judges and those who prosecuted him—prevented him from receiving a fair trial before neutral and detached fact-finders.

Bar counsel's reply included an affidavit by Edwin F. Hendricks, Esq., who stated that

> I was appointed lead Bar Counsel to Special Administrative Committee S-25 of the State Bar of Arizona (the "Committee") in September of 1982. . . .
>
> 2. Since my appointment as Bar Counsel, I have regarded communications and meetings between Bar Counsel and the Committee as protected by the attorney-client and work-product privileges. Without waiving either of those privileges, I will set forth the general topics of discussion at certain meetings between Bar Counsel and the Committee.

Mr. Hendricks went on to allege that only procedural matters of no special import had been discussed at these *ex parte* meetings. Neither of the associate bar counsel and none of the three Committee members filed an affidavit on this issue.

Before the motion to disqualify was ruled upon, petitioner took Mr. Hendricks' deposition. Mr. Hendricks acknowledged that no record was ever made of the meetings between the committee and

bar counsel, and that their communications were all "oral." He again asserted the attorney-client and work-product privileges to avoid disclosing the contents of the *ex parte* communications. Petitioner then moved the Committee to order the disclosure.

Without comment, the Committee denied the motion to disqualify on September 15, 1983. As to the motion to compel, the Committee stated:

> 11. As to Respondents' oral objection as to the refusal of Mr. Edwin F. Hendricks to disclose statements at his deposition or the content of a meeting held on July 5, 1983, by Bar Counsel and State Bar Special Administrative Committee S-25, to wit: Mr. James M. Marlar and Mr. Jeremy Toles with Mr. Dennis I. Wilenchik absent, and the argument that there may be a waiver of the attorney/client privilege, it is ordered denying Respondents' objection and holding there has been no waiver of the attorney/client privilege between Bar Counsel and the State Bar Special Administrative Committee.

This ruling acknowledged the Committee's attorney-client relationship with bar counsel.

Bar counsel and the Committee continued their investigations and in November of 1983, filed a Second Amended Complaint. Counts five, six and seven were materially amended and a new count ten was added.

An evidentiary hearing was held from January 23-27, 1984. On January 25th, bar counsel again moved to amend the complaint. The amendment was alleged to be necessary because of evidence "to be introduced at the hearing" which would show an additional ethical violation.

The third amended complaint was signed by the Committee chairman on March 21, 1984. It added as count eleven the two separate allegations of misconduct referenced in the January 25th motion.[2] Further evidence was taken on March 21-24.

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[2]The Arizona Supreme Court dismissed these additional charges as they applied to the petitioner, and hence the impropriety of taking evidence before formal charges were filed is not at issue in this petition. Cf. *In Re Ruffalo*, 390 U.S. 544 (1968).

The Due Process issues were unsuccessfully reiterated to the Committee once the evidence was closed. They were also raised on appeal to the Disciplinary Commission. See, Commission Decision, Appendix B at page 56. The Commission noted that "Apparently bar counsel also met with the Committee as its legal adviser on the motions to disqualify," but did not otherwise discuss the *ex parte* communications. Appendix B, at page 57.

The Commission concluded that the merger of prosecutorial and adjudicative functions was constitutionally acceptable under *Withrow v. Larkin*, 421 U.S. 35 (1975) and summarily rejected Petitioner's Due Process challenge.

After oral argument in the Arizona Supreme Court, however, the Court remanded for discovery on the content of the *ex parte* communications.

Bar counsel produced a "confidential" letter dated July 3rd from Mr. Hendricks to Committee Chairman Toles. (Appendix G) Mr. Hendricks asked the committee to "issue an order giving the respondents and their counsel a deadline for responding to our long-standing discovery requests." He then set forth a discovery schedule and proposed an agenda for a meeting to discuss and clarify the existing charges.

Associate bar counsel David Campbell answered Petitioner's interrogatories about the July 5, 1983, *ex parte* meeting between all three bar counsel and the Committee. (Appendix H) It was held at the Phoenix Country Club Men's Grill. Bar counsel and the Committee went through each charge in the complaint—which petitioner had already moved to dismiss—and deleted charges they thought would not be successful, altered others, and allowed some to stand. There was a detailed discussion of the evidence pertaining to the charges, after which bar counsel recommended that a new charge be added. Following this meeting, the Committee retired to another room of the Country Club and voted to accept all of the recommendations it had received *ex parte* from bar counsel. The First Amended Complaint was filed later that day.

The Arizona Supreme Court found nothing wrong with either the relationship between bar counsel and the Committee or with

the *ex parte* communications, citing *Withrow v. Larkin* to support its view. It went on to note that even if there was a "technical" Due Process violation, it was "cured by our order allowing discovery and by the independent review conducted by both the Commission and this Court." 741 P.2d at 727; Appendix A at page 8.

Petitioner's trial lasted for nine days and resulted in over 2,000 pages of testimony. Out of the four different complaints and nearly twenty different charges, Petitioner was found guilty of only one ethical violation. The court held, in the face of sharply conflicting testimony, that Petitioner had engaged in false, deceptive and misleading television advertising and suspended him from practice for thirty days.

The Court based its finding upon selected evidence that Petitioner used ads which implied that his firm could and would take cases to trial. The ads were found to be misleading because although the firm did a good job of working cases up, it had no experienced trial lawyers and contracted, at its own expense, to have competent, experienced lawyers from other firms try its cases. 741 P.2d at 272-278; Appendix A, at pages 17-18.

Petitioner moved for rehearing and reiterated the Due Process arguments rejected in earlier decisions. He also argued that (1) he was entitled to a neutral and detached finder of fact before whom evidence was taken, (2) the Supreme Court's *de novo* review was not a constitutionally acceptable substitute for that right, (3) the Supreme Court could not weigh evidence or determine witness credibility from a transcript and (4) the existence of an attorney-client relationship between the Committee and bar counsel was a *per se* Due Process violation.

Rehearing was denied without comment and this petition followed.

REASONS FOR GRANTING THE WRIT

Although all three lower tribunals claimed support for their decisions in *Withrow v. Larkin*, 421 U.S. 35 (1975) the two cases are at opposite ends of the spectrum.

In *Larkin*, the investigation was conducted by an agency employee who had no *ex parte* contact with the agency members.

Here, the agency members and their attorneys conducted the investigation together and held numerous *ex parte* meetings to discuss the case.

In *Larkin*, there was no special relationship between the agency and the prosecutors. Here, the prosecutors considered themselves and were considered by the agency as its own attorneys, with whom the agency enjoyed a confidential and privileged attorney-client relationship.[3]

In *Larkin*, probable cause was determined by the agency *only* after a formal, recorded evidentiary hearing which the accused

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[3]Federal courts have not looked upon an attorney-client relationship between the judge and counsel for one party with the same indifference as the Arizona Supreme Court did here. In *Rapp v. Van Dusen*, 350 F.2d 806 (3d Cir. 1965), the court ordered a judge to disqualify himself once the judge had designated attorneys for defendant as his own counsel in plaintiff's mandamus proceeding. The court stated:

> For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality. Litigants are entitled, moreover, to a judge whose unconscious responses in the litigation may be struck only in the observing presence of all parties and their counsel. *This right is impaired when a party is required to meet in his opponent an advocate who has already acted as the judge's counsel in the same litigation.*

350 F.2d at 812 (emphasis added). *Accord, Texaco, Inc., v. Chandler*, 354 F.2d 655 (10th Cir. 1965), *cert.denied*, 383 U.S. 936 (1966).

The rule that one should not have to litigate against the judge's lawyer arises from the special relationship between an attorney and his client. As the Arizona Supreme Court acknowledged in *Matter of Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985), those who consider themselves clients depend upon their attorneys for confidentiality and fairness. "Clients can be expected to assume that one whom they have come to look upon as 'their lawyer' will protect them, or, at least, not harm them." 708 P.2d 1302.

The committee viewed bar counsel as its own lawyer in these proceedings. There was a relationship of trust and confidentiality that petitioner's attorney could never approach. Thus, in a case where much of the evidence was disputed and credibility was a key factor, bar counsel had an implicit advantage. As the Tenth Circuit acknowledged in *United States v. Ritter*, 540 F.2d 459, 462 (10th Cir.), *cert.denied*, 429 U.S. 951 (1976), "[B]ias in favor of or against an attorney can certainly result in bias toward the party. Thus, if a judge is biased in favor of an attorney, his impartiality might reasonably be questioned in relationship to the party."

was invited to attend. This insured against the possibility that agency members might make factual determinations after an adversary hearing by "relying upon evidence not then fully subject to effective confrontation." 421 U.S. at 54, n.20.

Here, probable cause evidence was presented orally to the agency members in unreported, informal *ex parte* meetings with the agency's prosecutors.

In *Larkin*, the only concern was whether the *investigative* and adjudicative functions had been impermissibly merged; there was never any question about merging the *prosecutorial* and adjudicative functions because the prosecutor in *Larkin* came from outside of the agency. Here, however, all three functions—investigative, prosecutorial, and adjudicatory—were merged and for a long time the agency proceeded as if these functions were all the same.

Finally, in *Larkin*, the investigative function terminated when evidence was presented at the probable cause hearing. After the hearing, the Agency members met privately and determined whether probable cause existed.

Here, the investigation continued until long after the first set of charges was filed. It extended through the first five days of trial, when the final charge was added. Agency members met several times with the prosecutors to discuss and determine probable cause and to discuss the addition, deletion or modification of the charges.

In short, this case is distinguishable from and far more extreme than *Larkin* because all of the safeguards present in *Larkin* are missing here. It is the very absence of these safeguards that makes this case appropriate for plenary review.

The Court has not decided any case involving a significant merger of the prosecutorial, investigative and adjudicatory functions in the nearly thirteen years since it decided *Larkin*.

Review should be granted because it will allow the Court to apply *Larkin* to a different and much more substantial merger of the prosecutorial, investigative and adjudicative functions. This application will assist lower courts and governmental agencies in resolving a difficult, complex and increasingly common problem of agency organization: how much overlap will the Due Process Clause tolerate between investigation, prosecution and adjudication.

There is a second reason for granting the writ.

This Court has flatly rejected the notion that a trial *de novo* cures Due Process violations in a lower tribunal. *See, Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972):

> [N]or, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

Because the Arizona Supreme Court claimed it could legitimate a constitutionally flawed fact finding procedure by reviewing *de novo*[4] the record generated by that flawed procedure, its decision is utterly at odds with this Court's ruling in *Ward*.

Certiorari should therefore be granted to eliminate any doubt about the extent to which encroachments upon the *Ward* holding will be tolerated by this Court.

CONCLUSIONS

For the reasons set forth above, the Court should issue a writ of certiorari to the Supreme Court of Arizona to review its decision in the instant case.

Respectfully submitted,

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Attorney for the Petitioner

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January 2, 1988

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[4]There is a fundamental difference between the *trial de novo* offered to Mr. Ward and the *review de novo* offered to the Petitioner. In *Ward*, both the state and the defendant started all over again in the superior court, with no reference

to what happened in the mayor's court. In the case at bar, however, petitioner cannot start all over and make a new record before an impartial fact finder. He can only ask the new fact finder to review what the first one did. The vice of this procedure is that it does not take into account the great probability that because the original fact-finding procedure is tainted, it is incapable of generating a truly fair record upon which the *de novo* review can be based.

Nor does it take into account the nearly impossible task of deciding witness credibility by reading a transcript. *See, Matter of Yamagiwa*, 97 Wash.2d 773, 650 P.2d 203 (1982).

APPENDIX F

Excerpts of Rules 33 and 34 of the Supreme Court of Arizona, Governing Disciplinary Investigations and Prosecutions

These rules were repealed in 1984, but were nonetheless applied to all proceedings in the case at bar.

RULE 33. INVESTIGATION, FILING SYSTEM AND HEARING

* * *

33(B) Investigation, formal complaint, hearings, bar counsel, staff examiner

* * *

2. When a complaint is referred to a committee the committee shall conduct such preliminary investigation as will enable it to determine whether there is probable cause to believe that the member in question is or may be guilty of misconduct justifying disciplinary action. If, after such preliminary investigation, the committee is of the opinion that no such probable cause exists, it shall so report to the board in writing. The board shall advise the complainant, if any, in writing of the action taken by the committee. If, after such preliminary investigation, the committee is of the opinion that such probable cause does exist, it shall conduct such additional investigation as it deems necessary to enable it to institute a formal complaint against the member in question and shall designate one or more active members, other than one of their number, to act as bar counsel in the investigation and presentation of evidence in the matter under consideration. Prompt notice shall be given to the board of the name of bar counsel. As soon thereafter as possible the committee shall prepare a formal complaint against the member stating specifically the acts of misconduct charged and noticing the member in question to appear before the committee at a date certain for a hearing to determine the truth of the charges made against him and whether discipline is warranted. The formal complaint shall be signed by the chairman of the committee.

3. At any stage of investigation the committee may file a written request to the board to provide the committee with one or more staff examiners to aid it in conducting its investigation. The request shall describe in detail the reason why a staff examiner is needed and the scope of the work to be done. The board shall act on the request at its next regular meeting or at a special meeting if time will not permit waiting until the next regular meeting. If the board grants the request, it shall employ a suitable staff examiner for the committee for the purposes described in the re-

quest. The person or persons employed as a staff examiner shall work under the supervision of bar counsel.

4. Staff examiners may but need not be members of the state bar and may be selected from the regular employees of the state bar. The general function of bar counsel and staff examiners in all stages of a disciplinary matter shall be to present all the material facts to the appropriate committee, the board or this court. Their function is not that of a prosecutor.

RULE 34. PLEADINGS AND PROCESS

* * *

34(C) Amendment. The committee at any time prior to the conclusion of the disciplinary hearing may allow amendments to the formal complaint or answer. The formal complaint may be amended to conform to the proof or to include further charges, whether occurring before or after the commencement of the disciplinary hearing. If an amendment to the formal complaint is made, respondent shall be given reasonable time to answer the amendment, to produce evidence and to respond to the charges.

APPENDIX G

Letter from Lead Bar Counsel Edwin F. Hendricks to the Chairman of Special Administrative Committee S-25

MARTORI, MEYER, HENDRICKS & VICTOR
A PROFESSIONAL ASSOCIATION

Paul J. Meyer	**Joseph P. Martori**	**Suite 4000**
Edwin F. Hendricks	**David Victor**	**2700 North Third St.**
Jones Osborn II	**William J. Maldeon**	**Phoenix, AZ 85004**
Larry A. Hammond	**Seffrey L. Sellers**	**602-263-8700**
Randall C. Nelson	**James E. Scarboro**	
Lucia A. Faronas	**Donald W. Bivins**	
R. Douglas Dalton	**Mark S. Wallace**	**Telex/TWX**
Vincent F. Chiappetta	**Ron Kilgard**	**910-950-1101**
Thomas M. Curzon	**Jay I. Moyes**	**Telecopy (24 Hours)**
Donald M. Peters	**David G. Campbell**	**602-266-6751**
Helen C. Grimwood	**Parker C. Folse**	
Michael B. Witney	**James A. Bush**	**FILE NO.**
Gary A. Gotto		

July 1, 1983

CONFIDENTIAL
M. Jeremy Toles
Chairman, Special Administrative
Committee S-25
1010 East Jefferson Street
Phoenix, Arizona 85004

Re: Special Administrative Committee S-25

Dear Jerry:

The purpose of this letter is to bring you up-to-date on various developments in the above-referenced matter.

First, as you know, on Tuesday, June 28, the Arizona Supreme Court denied jurisdiction in the special action filed by Messrs. Zang and Whitmer. Therefore, we should move ahead with discovery and a hearing.

Second, as I mentioned during our phone conversation yesterday, it would be helpful if you would issue an order giving the respondents and their counsel a deadline for responding to our

long-standing discovery requests which were the subject of their Motion for Protective Order and subsequent special action.

Third, Walter Cheifetz and I have tentatively agreed to reschedule the following depositions for the following dates:

a. Mr. Cheifetz will depose Esther Adams on July 11.

b. We will depose Robert Bartkus, an investigator for Zang & Whitmer, on July 12. We are also attempting to schedule the deposition of Candi Bartkus, a former secretary/paralegal employed by Zang and Whitmer, for the afternoon of July 12.

c. We will depose Messrs. Zang and Whitmer on July 13.

d. We will attempt to schedule the deposition of the Custodian of Records of Good Samaritan Hospital vis-a-vis the Lucien T. Smith hospitalization sometime during the week of July 11.

e. Mr. Cheifetz will depose Kathy Hillman on August 12. Miss Hillman has requested this delay since she wants Don Wilson from her office to be present to represent her during her deposition and Mr. Wilson will be out-of-town during the entire month of July.

f. Undoubtedly, there will be other depositions scheduled, including perhaps the depositions of Mrs. Lucien T. Smith, various other ex-Zang & Whitmer employees and/or various insurance adjusters and claims managers with whom Zang & Whitmer have dealt with over the past several years.

Fourth, Mr. Cheifetz and I have tentatively agreed to re-schedule the disciplinary hearing for September 6 through 8. Since these dates require a further 60-day extension from the Board of Governors, I have asked Mr. Cheifetz to stipulate to a waiver of the time requirements set forth by the Supreme Court Rules and he has agreed to do so. I will forward the executed Stipulation as soon as it is ready so that you can sign it and forward it to the Board for ratification.

Fifth, this is to confirm that you and the other Committee members will meet with me and other Bar counsel who are available at 7:00 a.m. on Tuesday, July 5 at the Phoenix Country Club Men's Grill for the purpose of discussing a proposed Amended

Complaint. As I mentioned, at a minimum, we believe we should (a) re-examine Counts 8 (costs padding), 9 (rejection of subrogation claims) and 10 (tape-recording without consent) to determine whether these counts indeed set forth an ethical violation; (b) clarify Count 6 (Lucien T. Smith) to reflect the additional facts we have gleaned from our investigation and discovery to date; (c) add references in our advertising counts to various advertisements which have come to our attention through our investigation and discovery; and (d) add other allegations of ethical violations which have come to our attention since the filing of our original complaint.

We will, of course, keep you advised of further develop-ments as they occur.

Very truly yours,

Edwin F. Hendricks

cc: James M. Marlar, Esquire
Dennis I. Wilenchik, Esquire
Frank Lewis, Esquire
C. Owen Paepke, Esquire
Michael M. Sophy, Esquire
David G. Campbell, Esquire

APPENDIX H

Excerpt of Answers to Interrogatories By David G. Campbell, Associate Bar Counsel, About the July 5, 1983, Meeting

Answer: A breakfast meeting was held on July 5, 1983 between the Committee and Bar Counsel. I recall that Jerry Toles, Ed Hendricks, and I were in attendance. I recall that one of two others were also present, but I do not remember whether they were Owen Paepke, Frank Lewis, Jim Marlar, or Dennis Wilenchik. The purpose of the meeting was to report the results of Bar Counsel's ongoing investigation and research. Although I do not recall the precise words that were spoke, I believe the substance of the communications was as follows.

I suggested that the committee revise count three to delete allegations that the Respondents' advertisements were "lurid and not presented in a dignified manner." I explained my view that any discipline based upon such allegations would violate the Respondents' rights under the First Amendment. I suggested that count three be limited to allegations of misleading advertising, provided the committee found probable cause to support such allegations.

I suggested that respondent Whitmer's name be deleted from count four of the complaint. I explained that my interviews with former paralegals from the Respondents' office and other witnesses suggested that Mr. Whitmer did not make representations of specialization or special expertise to potential clients.

I suggested that the allegations of count five be modified to allege only that Respondent Zang had directed paralegals to deal with both potential and existing clients as though they were attorneys authorized and licensed to practice law. In the original complaint, this allegation had been made against Respondent Whitmer as well. I explained to the Committee that my interviews with former paralegals from the Respondents' firm and other witnesses had suggested that Mr. Whitmer did not directly engage in this conduct. Because those interviewed had told me that Mr. Whitmer was aware of these instructions to paralegals by Mr. Zang, I suggested that the Committee further modify count five to allege upon information and belief that Mr. Whitmer knew of this conduct and permitted it to continue.

One of the Bar Counsel attending the meeting (I do not recall which) suggested that the Committee revise count six of the complaint. Count six had originally alleged that Respondent

Zang settled the personal injury of Lucien T. Smith after Mr. Smith's death. Investigations conducted by Frank Lewis, and documents provided by the Respondents, had demonstrated that Mr. Smith's claim was settled before his death. These facts had been disclosed by Frank Lewis to the Committee at an earlier hearing attended by the Respondents' counsel. At that hearing, Mr. Lewis had suggested that the Committee drop count six from the complaint. At the July 5, 1983 meeting, the Committee inquired about the circumstances under which Mr. Smith's claim had been settled. We explained to the committee the results of our investigation. That the power of attorney used by the respondents to execute the settlement drafts had been obtained from Mr. Smith while he was hospitalized shortly before his death, and had been used to execute the settlement drafts after he had died. Esther Adams had told us that Bob Bartkus had obtained the power of attorney, and that upon returning from the hospital Mr. Bartkus had indicated that Mr. Smith was so ill that Mr. Bartkus had to help him sign the power of attorney. Esther Adams had also told us that Mr. Zang knew Mr. Smith was dead when he used the power of attorney to endorse the settlement draft. On the basis of this explanation, the Committee decided to amend count six to allege that the power of attorney had been obtained under questionable circumstances and had been knowingly used after its expiration.

I suggested to the Committee at the July 5, 1983 meeting that count seven of the complaint be amended. Count seven concerned alleged alterations of medical reports by Mr. Zang. I suggested that count seven would be more precise if it alleged, as Bar Counsel had been informed by various former paralegals from Respondents' offices, that these alterations were made with the intent to misrepresent to insurance companies the condition of the respondents' clients. Ed Hendricks and I further explained to the Committee that Joyce Martone, a former paralegal from the Respondents' office and Esther Adams, also a former paralegal, had indicated during interviews that Respondent Whitmer was aware of these alterations of medical reports. We therefore suggested that count seven be amended to allege, upon information and belief, that Re-

spondent Whitmer knew of this improper conduct and permitted it to continue.

I suggested that count eight of the original complaint be dropped. I explained to the committee that I had interviewed a number of former paralegals from the Respondents' office, and one or two former clients. These witnesses had told me that they knew of no instances in which the Respondents charged clients for investigatory and photographic costs without prior authorization or explanation.

Ed Hendricks and I explained to the Committee the results of our ongoing investigation. We explained that we had learned from the American College of Legal Medicine and the American Academy of Forensic Sciences that Mr. Zang was not a fellow in those organizations as he claimed. We told the Committee that this information had been obtained by telephone, and was in the process of being confirmed in writing. We provided the Committee with copies of various newspaper and magazine advertisements run by the Respondents in 1980, and various letters mailed by the Respondents in 1980 and 1981, all of which claimed that Mr. Zang was a fellow in both organizations. On the basis of these investigative findings, we suggested that the Committee add a new count regarding Mr. Zang's claimed fellowships to the complaint, and that the new allegations be designated count eight.

I explained to the Committee that I had recently appeared in the Arizona Supreme Court and represented the State Bar in opposing the Respondents' petition for special action. I told the Committee that during that hearing Justice Feldman had questioned me about the contents of count nine of the complaint. In the original complaint, count nine alleged that the respondents had settled a client's personal injury claims with two insurance companies. During his questioning, Justice Feldman stated that dual settlements were legal and appropriate for personal injury claims, but were improper for property damages claims. I returned to my office after the hearing and researched the questions raised by Justice Feldman. I determined from that research that a dual settlement for personal injury claims was, in fact, appropriate, but that a dual settlement of property damage claims was clearly improper. Having reached this conclusion, I again

interviewed Esther Adams to determine the nature of the settlement that had been obtained by the Respondents on behalf of their client. Esther Adams told me that the settlement she recalled had been made on behalf of Betty Daniels, and that Mr. Zang had settled Ms. Daniels' property damage claim with two different insurance carriers. I recounted the results of my research and my interview with Esther Adams to the Committee, and suggested that it amend count nine to drop the allegation regarding personal injury claims and add allegations regarding dual settlement of a property damage claim.

One of the Bar Counsel (I do not remember which) suggested that the Committee drop count ten from the complaint. Bar counsel explained that interviews with former paralegals and additional witnesses, and letters obtained from the Respondents or other sources, had failed to substantiate the allegations of count ten.

I believe that the above statements and explanations by Bar Counsel constituted virtually all of the communications that occurred at the July 5, 1983 breakfast meeting. I do not recall Mr. Toles, or any other member of the Committee who might have been present, making any remarks. I recall the meeting as being primarily a presentation by Bar Counsel of the results of our ongoing investigation. To the best of my recollection, the Committee did not discuss Bar Counsel's recommendation during the July 5, 1983 breakfast meeting, and did not make a decision in our presence. Instead, the Committee retired to deliberate on its own regarding these matters, and Bar Counsel left the Phoenix Country Club to return to their offices. I believe that the chairman of the Committee, Jerry Toles, called me later in the day to inform me that the Committee had decided to accept virtually all of Bar Counsel's recommendations. I accordingly revised the complaint to reflect the Committee's decision, sent it to Jerry Toles for his signature, and mailed the complaint to Respondents' counsel later that day. Attached is a July 5, 1983 letter that I sent to Walter Cheifetz enclosing the Committee's new complaint.

I recall that Bar Counsel's communications at the July 5, 1983 meeting were carefully limited to reporting the results of Bar Counsel's investigation. I recall being impressed during the

meeting by the fact that all of the discussions were conducted in a professional and objective manner, that no negative or derogatory comments were made about the Respondents, and that there was no discussion of the merits of the matters we were discussion or the manner in which the Committee should or would eventually rule on the allegations of the complaint.